

exhibit B). It is common ground that the defendants were entitled to this \$5/- by virtue of the provision in the specification quoted above.

The architects, however, also demanded \$500/- for the original copy of the reinforced concrete plans, without which the work could not be carried out, and the plaintiff paid the architects the sum of \$500/- on the 18th March, 1939. The defendants have not seriously contended either before the District Judge or before the Supreme Court that they had a shadow of justification for the demand of \$500/- on the construction of the agreement. There were some sort of suggestion in the Court below that such a payment was sanctified by custom, but no evidence in support of any such custom was called. In fact the defendants preferred not to give evidence at all. Their case, to put it bluntly, was that the plaintiff having parted with his \$500/- could not get it back; and that if he had paid it under a misapprehension of his legal rights, there was no equity to grant him any relief.

Fortunately that is not, in my opinion, the law. It is true that an action will not generally lie to recover back money paid under a mistake in law where both parties are fully cognizant of the facts, but that principle does not apply where, as in the present case, the plaintiff, a Chinese contractor, was ignorant of his legal rights under a series of complicated documents, and where the defendants, who are architects of long standing, must be deemed to have been perfectly well aware of the legal position. As Mellish L.J. said in *Rogers v. Ingham*⁽¹⁾:—

"But on the other hand I think that, no doubt, as was said by Turner, L.J. 'This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact' (*Stone v. Godfrey*⁽²⁾) that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it."

The supplying of plans is of course part of the duties of architects and is covered by their fee, and it is highly inequitable that they should obtain and attempt to retain additional fee from the contractor for something for which they were already paid or entitled to be paid by their employers. It is not too much to say that they improperly took advantage of the plaintiff's ignorance, and in such a case a Court of Equity will grant relief.

The learned District Judge decided against the plaintiff on the sole ground that the defendants were not parties to the contract between the employer and the contractor. With all respect to the learned District Judge I fail to follow this reasoning. The plaintiff is not suing on the contract; he is suing for money

paid to the defendants under a mistake of law. The contract is merely evidence to prove the rights of the plaintiff thereunder and the duties of the defendants as the employers' agents for the purposes specified in the contract. The \$500/- was not paid in pursuance of the contract, nor could the plaintiff have any claim against the employers for something which the defendants did beyond the scope of their authority and in violation of their duties.

As regards the suggested custom, it is not open to parties to prove a custom which is in contradiction to the express terms of a written contract. That being the case it is unnecessary to refer back the case for proof of a custom which so far has not been established, and would in my opinion be irrelevant if it were established.

The appeal must, therefore, be allowed and judgment entered for the plaintiff for \$500/- and costs in the Court below. The appellant will be entitled to the costs of the appeal and the deposit should be paid out to him or his solicitor.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.A.

March 21, 1940.

BALDWIN LOWICK AND ANOTHER

v.

THOMAS ALFRED MAYHEW & ANOTHER.

[SINGAPORE SUIT No. 436 of 1936]

Civil Procedure Rules—Costs—Schedule C Item 131—Perusal of Summons in Chambers.

On a party and party taxation no fee can be charged under item 131 of Schedule C for perusal of a summons in chambers. Item 152 however contemplates that there may be perusals for which a fee can be charged on solicitor and client taxations but which would not be allowed on a party and party taxation, there being in the Colony a discretion to make such an allowance.

Case referred to:—

(1) *Alcock Ashdown & Co. v. Chief Revenue Authority Bombay*, 50 I.A. 238.

SUMMONS IN CHAMBERS.

F. H. O'Reilly for applicants.

R. H. Green for respondents.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, J.A.—This is a summons to review a taxation by the Registrar who disallowed an item of \$8/- for perusing a summons in chambers.

It was sought to charge this fee under item 131 of Schedule C which provides a fee for perusal.

"Of statement of claim, defence, reply, joinder of issue or other pleading, not being a petition in a pending cause or matter, or a summons other than originating summons, by the solicitor of the party to whom the same are delivered."

The only question is whether between the words "or" and "a summons", the word "of" should be implied, or the words "not being."

The history of the item is beyond doubt. It was originally taken from what is now item 122 of Appendix N to the Rules of the Supreme Court of England, where it reads as follows:—

"Of statement of claim, defence, reply, joinder of issue, and other pleading (not being a petition in a pending cause or matter, or a summons other than an originating summons) by the solicitor of the party to whom the same are delivered."

This item was reproduced as item 110 in Schedule C of the Civil Procedure Code, 1907, which reads as follows:—

"Of statement of claim, defence, reply, joinder of issue or other pleading, not being a petition in a pending cause or matter, or a summons other than originating summons, by the solicitor of the party to whom the same are delivered."

It will be seen that the brackets have been omitted, but the comma after 'pending cause or matter' has also been omitted. I feel no doubt that the effect of the item in the Civil Procedure Code is exactly the same as that of the item in Appendix N, and that no fee is chargeable for perusing a summons in chambers under either provision. Then the Civil Procedure Code was repealed, and the present orders and rules substituted. The item is faithfully reproduced except that the comma after 'pending cause or matters' is restored.

It may be that it is not permissible to interpret the local item by assuming that it means the same thing as in the English rules, notwithstanding the omission of the brackets. On the contrary the Court may come to the conclusion that the difference is due not to a difference in drafting, but is a deliberate variation (see *Alcock Ashdown & Co. v. Chief Revenue Authority, Bombay*,⁽¹⁾). But the comparison must not be between the present item and the item in Appendix N, but between the present item and item 110 of Schedule C of the Civil Procedure Code, 1907. The present item re-enacted the item in the 1907 Schedule with the addition of a comma. I think it is a justifiable assumption that if it had been intended to alter the

whole effect of the item in the Civil Procedure Code, the alteration would have been effected in clear and unequivocal language. The inference therefore is that the addition of the comma was a difference in drafting, and was not intended to alter the original sense.

The matter can also be approached by construing the item as it stands without reference to its previous history. After the word 'pleading' there is a reference to a petition and to a summons. The two are not described in exactly similar language, but the description in each case amounts to the same thing. The petition referred to is not an originating petition and the summons is not an originating summons. The item might well read "not being a petition other than an originating petition, or a summons other than originating summons." If it were worded this way there could be no possible doubt that both petition and summons were excluded. Is the item to be given a different meaning because the petition is described as a "petition in a pending cause or matter" instead of "a petition other than originating petition"?

The schedule must also be construed as a whole. It is impossible to believe that it was intended that the fee for drawing a summons in chambers (item 15) should be \$2/-, while the fee for perusing the same summons should be \$4/-; or that the fee for persuing an originating summons of four folios would be only \$1/- (item 137), while the fee for perusing an ordinary summons to proceed would be \$8/- on the higher scale. If the language were unequivocal the Court would of course accept it, but, as this is not the case, the Court cannot be expected to give an interpretation which is inconsistent with the scheme of the Schedule as a whole.

I feel no doubt, therefore, that the fee is not chargeable under item 131. It is said that a charge may be allowed under item 152 and I have no wish to interfere with the Registrar's discretion in the matter. I would, however, point out that the footnote to item 152 contemplates that there may be perusals for which a fee can be charged in a solicitor and client taxation but which would not be allowed in a party and party taxation—in other words that, as in England, there are perusals in a party and party taxation for which no fee chargeable, though here there is a discretion which does not appear to exist in a party and party taxation in England, as there is no counterpart to item 152 in the English rules.

Order accordingly.